



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 16, 1998

Mr. W. Daniel Vaughn  
McLeod, Alexander, Powel & Apffel  
P.O. Box 629  
Galveston, Texas 77553

OR98-2716

Dear Mr. Vaughn:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 118738.

The Board of Trustees of the Galveston Wharves (the "board") received a request for billing records presented by the law firm of McLeod, Alexander, Powel, & Apffel to the board for the period January 1, 1997 through July 20, 1998. You seek to withhold portions of the requested information under sections 552.107(1) and 552.103 of the Government Code.

We note at the outset that section 552.301(a) of the Government Code requires that a governmental body seeking to withhold information in response to a written request "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10<sup>th</sup> business day after the date of receiving the written request." The ten-day deadline here was August 3, 1998. Your initial letter, with attachments, seeking this office's determination in this matter, dated July 27, 1998, raised, as exceptions to disclosure for particular portions of the requested information, sections 552.107(1) and 552.103. Subsequently, in a letter dated September 3, 1998, you informed us that you were no longer seeking a determination as to some of the materials you had sought to withhold in your July 27 letter, and also provided revised arguments and new claims for withholding certain portions of the materials for which you still sought our determination. Pursuant to section 552.301(a), we do not consider the exceptions for particular information raised in

your September 3 letter to the extent they were not raised in your July 27 letter, i.e. within the statutory ten day period.<sup>1</sup>

Section 552.107(1) protects information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct." *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.* Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. Where the governmental body seeks to withhold attorney fee bill information under section 552.107(1), it must explain how particular information constitutes client confidences or attorney advice. Open Records Decision No. 589 (1991). "In general the attorney's mere documentation of calls made, meetings attended, or memos sent is not protected [under section 552.107(1)], if no notes regarding the attorney's legal advice or the client's confidences are included." Open Records Decision No. 574 (1990). We have reviewed the material for which you claimed the protection of section 552.107(1). In our opinion, while some of the information you have marked may constitute attorney work product, you have not established that any of these materials are client confidences or attorney advice which may be withheld under section 552.107(1).

Section 552.103(a) of the Government Code, known as the litigation exception, excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). You have represented that the materials you seek to withhold under section 552.103

---

<sup>1</sup> We note that this office has under proper circumstances accepted claims made under section 552.103, the litigation exception, after the ten day deadline, but only where the governmental body has demonstrated that the litigation in question arose after the ten day deadline. You have not made such showings here with respect to the section 552.103 claims made for the first time with respect to particular information in your September 3 letter. Hence we do not consider these claims.

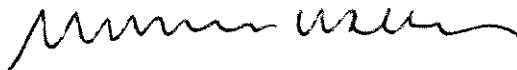
relate to pending litigation. We have reviewed the information which you seek to withhold under section 552.103 and your arguments for withholding. We conclude that, so long as the information in question relates to litigation which is still pending and to which the board is still a party, you may withhold under section 552.103, the information you have marked in items 1,3,10,11,12, 13, 14, 26, 28, 33, 55, 56, 57, 62,74,80, 81, 108, 109, 110, 111, 116, 117, 120, 121, 152, 153,154, and 155.

We assume, however, that none of the information in the records at issue has previously been made available to the opposing party in the litigation. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). To the extent the opposing party has seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103. Similarly, section 552.103 does not authorize the board to withhold materials which have already been made available to the public. Open Records Decision No. 436 at 7 (1986).

Finally, we note that you indicate that some of the requested information identifies witnesses or victims of sexual harassment. Section 552.101 of the Government Code requires withholding information made confidential by judicial decision. Section 552.101 incorporates common-law privacy protection. Information is protected by common law privacy if it is both highly intimate and embarrassing and of no legitimate public interest. The holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) requires that, where sexual harassment complaints were filed with the board and/or sexual harassment proceedings were brought, the identities of sexual harassment victims and witnesses be withheld under the common-law privacy aspect of section 552.101. You must therefore withhold such witness and victim identities.

Except as indicated above, you must release the requested information. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



William Walker  
Assistant Attorney General  
Open Records Division

WMW/ch

Ref.: ID# 118738

Enclosures: Submitted documents

cc: Mr. Marty Schladen  
Galveston Daily News  
P.O. Box 628  
Galveston, TX 77553  
(w/o enclosures)